BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION.

The opinion of the Court was handed down April 26, 1941, and is not yet reported.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is April 26, 1941 (petition for rehearing overruled May 16, 1941).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code, Section 240 (a), amended February 13, 1925 (Chapter 229, Sec. 1), 43 Stat. 438; Sec. 1217, U. S. Compiled Statute Cum. Supp. 1925 (28 U. S. C. A. 347).

3. The facts showing jurisdiction have heretofore been set out under "Statement of Matter Involved."

4. The judgment of the Court of Appeals failing to follow the rules of substantive law as enunciated by the Missouri courts as claimed herein is set out (R. pp. 109-119).

5. The cases believed to sustain said jurisdiction are as follows:

> Stoner v. N. Y. Life Ins. Co., 61 Sup. Ct. Rep. 336 (squarely in point, holding that where the Kansas City Court of Appeals held there was a jury question as to whether a disability provision of a policy offered a question for a jury under instructions embodying tests was approved by the Kansas City Court of Appeals, it was error for this Court to hold in effect that the evidence would not support the trial judge's finding in

insurer's action for a declaratory judgment that there was a total disability) (C. C. A. 8 reversed);

Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. Rep. 817;

Ruhlin et al. v. N. Y. Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. Rep. 860;

N. Y. Life Ins. Co. v. Jackson, 304 U. S. 263, 58 Sup. Ct. Rep. 871;

Rosenthal v. N. Y. Life Ins. Co., 304 U. S. 263, 58 Sup. Ct. Rep. 874;

Hudson et al. v. Munnier, 304 U. S. 397, 58 Sup. Ct. Rep. 954;

Mutual Benefit Health & Accident Assurance Co. v. Bowman, 58 Sup. Ct. Rep. 1056, 304 U. S. 549 (Sup. Ct. reversed Ct. of App. [C. C. A. 8] without hearing arguments);

Cities Service Oil Co. v. Dunlap, 308 U. S. 208, 60 U. S. Sup. Ct. Rep. 201 (question of burden of proof);

Fidelity Union Trust Co. v. Field, 311 U. S. ..., 61 Sup. Ct. Rep. 179 (Dec. 9, 1940 (holding that intermediate state courts must be followed);

West v. Amer. Tel. & Tel. Co., 311 U. S. ..., 61 Sup. Ct. Rep. 176 (following Fidelity Union Tr. Co.);

Act of June 19, 1934, Para. 1, U. S. C., Title 28, Para. 723b;

Lafferty v. Kansas City Casualty Co., 287 Mo. 555, 229 S. W. 750;

Gannon v. Laclede Gas Light Co., 145 Mo. 502, 47 S. W. 968;

Shaw v. American Ins. Union, 33 S. W. (2d) 1052;

National City Bank v. Mo. State Life Ins. Co., 332 Mo. 182, 57 S. W. (2d) 1066;

Dobyns v. Bay State etc. Ass'n, 144 Mo. 95, 45 S. W. 1107;

Berryman v. Southern Surety Co., 285 Mo. 379, 227 S. W. 96;

Gibson v. Ins. Co., 181 Mo. App. 302.

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition under I, page 1, which in the interest of brevity is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERROR.

1. The Court erred in holding, contrary to the Missouri rule, that a prima facie case can be overturned by the testimony of the insurance company and that a directed verdict can be entered, the Court of Appeals holding that the Supreme Court of Missouri has not definitely settled the question of the presumption arising from the delivery of a policy, of payment of the premium or the extension of credit (R. p. 115). **(Nothing could be more definite than the decisions of the Missouri Courts cited supra under "Jurisdiction.")** See particularly Lafferty v. Ins. Co., supra. Nor is there any confusion in the Missouri decisions, as the Court of Appeals sets out in its opinion (R. p. 115).

2. The Court erred in holding, contrary to the case of Gibson v. Ins. Co., 181 Mo. App. 302, 168 S. W. 818, the only case in Missouri on the point, that the delivery of the policy to the agent was not a delivery to the assured (who was also the agent) (R. p. 116).

3. The Court erred in holding, contrary to Missouri rule, that the plaintiff was bound by the testimony of the defendant insurance company, and in holding that the case should be taken from the jury.

4. The Court erred in failing and refusing to follow the Missouri decisions holding that the recital in the policy of the payment of the premium or the equivalent thereto could not be contradicted.

5. The Court erred in refusing to follow the Missouri rule that a delivery of the policy without the payment of the initial premium constituted an extension of credit.

V.

SUMMARY OF ARGUMENT.

The ruling of the Court of Appeals is directly in violation of the ruling of this Court in **Erie R. R. v. Tompkins,** 304 U. S. 64, 58 Sup. Ct. Rep. 817, and similar cases decided by this Court since the Erie case, holding that the federal courts are bound by the rules of substantive law as laid down by the state court.

The Court of Appeals has refused to follow the state rule holding:

1. That where a prima facie case is made on a policy of insurance, a case cannot be taken away from the jury and the question of delivery and the payment of premium is an issue of fact for the jury.

2. The credibility of witnesses is for the jury.

3. The holding of the Court of Appeals that the carbon copy of the memorandum contained in defendant's file in connection with the established practice of placing memorandums with policies leaves no rational doubt for a jury to settle, violates the rule of law as laid down by the Missouri Court that it is a question of fact to be determined by the jury.

4. The status of an agent of an insurance company, who is also the assured, is that of an assured, and where the policy is delivered to him, is delivered to him as an assured.

5. The recital in the policy that the premium has been paid, or a statement equivalent thereto, cannot be contradicted in a suit on a policy.

ARGUMENT.

1. The ruling of the Court of Appeals is directly in the teeth of the case of **Erie R. R. Co. v. Tompkins**, 304 U. S. 64, 58 Sup. Ct. Rep. 81, and similar cases since decided by that Court. The law is well settled in Missouri that the assured's possession of the policy raises the presumption that it has been delivered and paid for, or that credit has been extended, and where the evidence of the company is otherwise, the question is for the jury.

> Lafferty v. K. C. Casualty Co., 287 Mo. 555, 229 S. W. 750;
> Gannon v. Gas Co., 145 Mo. 502, 47 S. W. 968.

In the Lafferty case, cited supra, the Missouri Supreme Court, contrary to the statement about indefiniteness set out in the opinion of the Court of Appeals, held:

> "however strong and convincing may be the evidence introduced by the defendant to show that the policy had not been delivered or the premium paid before the death of the insured. The fact of nondelivery, where the policy was in the possession of the insured, is an affirmative defense and the weight of evidence to sustain it is a matter for the jury, which the Court cannot lawfully usurp."

2. The credibility of witnesses is for the jury. Under the ruling of the Court of Appeals, the Court and jury were bound to believe the defendant's witnesses. It is obvious that such is not the law. The dead man was not there to testify and tell the facts with reference to whether or not the so-called printed rules were placed with the policy, and even if they had been, Urseth would not have been bound by them. He was given the policy as **an assured** and **not** as an **agent.** This Court recently held in the Stoner case, decided December, 1940, cited supra, that the

federal courts are bound to follow the Kansas City Court of Appeals where they had made a finding on the same issue and wherein they had held that there was a question of fact presented as to whether or not the assured was totally disabled. The Court of Appeals for the Eighth Circuit undertook to say, as a matter of law, that the assured was not disabled on facts substantially the same as those before the Kansas City Court of Appeals. This Court reversed the Court of Appeals for the Eighth Circuit and held that it was bound to follow the ruling of the Kansas City Court of Appeals. An examination of the opinion of the Court of Appeals in the case at bar shows that it has failed to follow the Missouri decisions. It is noteworthy to point out to this Court that the Court of Appeals, in its opinion (R. p. 115), feebly undertakes to distinguish the Lafferty case, which is the leading case holding that the nondelivery of a policy is an affirmative defense, which the jury alone has a right to determine, so that the statement of the Court of Appeals that "a more definite investigation on the part of the Supreme Court of Missouri will perhaps be necessary to settle the question" is out of order and is not justified by the Lafferty case or the other numerous cases which were cited in the Court of Appeals in the motion for rehearing and which have been cited in the application for certiorari here.

3. Therefore the holding of the Court of Appeals that the carbon copy of the so-called memorandum contained in defendant's file removed the issue of fact and took away a jury issue, violates the substantive rule of law as laid down by the Missouri courts and practically all the courts in the country, as laid down in Shaw v. American Ins. Union, 33 S. W. (2d) 1052, that documentary evidence to be conclusive must be an instrument of record having legal efficacy, and before a person is bound thereby he must be a party thereto or be bound thereby or be estopped to deny

its truth. In the case at bar the assured had nothing to do with the so-called carbon memorandum. He therefore could not be bound thereby nor was he estopped.

4. We have only been able to find one decision, and that happens to be the Missouri case of Gibson v. Ins. Company, 181 Mo. App. 302, which holds that where a policy is delivered to an agent of an insurance company, and who also happens to be the assured, that a delivery to him is a delivery to him as an assured and not as an agent. This case is cited in Cooley's Briefs, Vol. 1, page 641, and in holding, as the Court of Appeals does, it is not only violating the Missouri rule, but is establishing a new rule of law. Contrary to the holding of the Court of Appeals, the Kansas City Court of Appeals in the Gibson case (l. c. 310) held:

> "But it is agreed, in substance, that since Sigler was the agent of defendant the delivery of the policy to him was not a delivery to the assured, but to an agent of defendant for delivery to the assured. This attempted distinction is too fine spun to merit serious consideration. Conceding that Sigler was the agent of defendant, he was also an applicant for insurance, and a delivery of the policy to him was a delivery to the assured."

5. The recital in a policy of the payment of the premium cannot be contradicted. In the case at bar the policy recites that the premium is to be paid on February 15th; it also recites that the policy was issued on February 20th. These recitals, together with the delivery of the policy on February 24th, conclusively establish a recital of the payment of the premium which cannot be contradicted or questioned in an action on the policy. Dobyns v. Bay State etc. Assn., 144 Mo. 95, 45 S. W. 1107; Berryman v. Surety Co., 285 Mo. 379, 227 S. W. 96.

CONCLUSION.

It is obvious, therefore, that the Court of Appeals has failed to follow the controlling Missouri decisions and has set up substantive rules of law of its own making which militate against the Missouri rules.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

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